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No. 75-404

In the Supreme Court of the United States

OCTOBER TERM, 1975

STATE OF INDIANA, PETITIONER

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks review of a decision affirming two district court judgments in which petitioner was held to have violated the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*

The violations were found to have occurred in the operation of two schools and fourteen hospitals. It is not disputed that in each of the institutions employ-

ees handle supplies, material, and equipment that have been moved into Indiana from sources outside the state (Pet. App. A2-A3, A8-A9, A19).[1]

Petitioner contends that the application of the Act to state schools and hospitals is unconstitutional, both under the Tenth Amendment and under Article IV, Section 4, of the Constitution (Pet. 10, 23). It also contends (Pet. 14) that the institutions are not, in any event, enterprises engaged in commerce within the meaning of Section 3(s)(4) of the Act, 29 U.S.C. 203(s)(4).[2]

These contentions do not present issues warranting review by this Court. The constitutional questions

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[1] In the schools case, it was stipulated also that employees regularly receive and unload interstate shipments of materials and supplies, place and receive interstate telephone calls, and prepare and mail letters, materials, and transcripts for transmission to points outside the state (Pet. App. A8-A9). The district court treated these facts as an additional basis of coverage (Pet. App. A14, A15), but the court of appeals rested its decision solely on the handling of goods of out-of-state origin (Pet. App. A6).

[2] At the time in question, Section 3(s) provided:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person * * *.

In 1974, the first paragraph was amended by P.L. 93-259, 88 Stat. 55, 59, which substituted "or employees handling" for "including employees handling" and inserted "or materials" after "working on goods."

are answered by prior decisions of this Court. The statutory question was decided correctly below and has in any event been disposed of by supervening amendment of the Act.

1. The contention that the Tenth Amendment prohibits application of the Act to the state institutions is answered by *Maryland* v. *Wirtz*, 392 U.S. 183, in which the Court held that the Tenth Amendment did not bar the 1966 extension of the Act's coverage to schools and hospitals operated by states. The more recent extension of coverage to state and local government activities in general is now under consideration by the Court in *National League of Cities* v. *Dunlop*, Nos. 74-878 and 74-879. But *Maryland* v. *Wirtz*, which controls the present case, was only recently reaffirmed in *Fry* v. *United States*, 421 U.S. 542, after argument was heard in *National League*.

2. The guarantee of a republican form of government in Article IV, Section 4 of the Constitution has no application to the statutory provisions involved here, which in no way affect the states' form of government but merely extend to the states the minimum standards of compensation generally applicable to employers operating schools and hospitals. Moreover, this Court has consistently held that questions arising under Article IV, Section 4, are political in character and therefore not justiciable. *Luther* v. *Borden*, 7 How. 1; *Georgia* v. *Stanton*, 6 Wall. 50; *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569; and see *Baker* v. *Carr*, 369 U.S. 186, 224-225, 227.

3. Petitioner contends that the Act is inapplicable

because the state institutions, rather than their patients and students, are the "ultimate consumers" of the food, medications, paper, printed material, equipment, and other supplies used in the services provided. Accordingly, petitioner argues, those commodities cease to be "goods" within the definition of Section 3(i) when they come into the physical possession of the institutions,[3] and it therefore follows that the courts below were in error in holding that the institutions have employees "handling * * * goods that have been moved in * * * [interstate] commerce * * *," within the meaning of Section 3(s)(4).

In rejecting this reasoning, the decisions below are in accord with *Brennan* v. *State of Iowa*, 494 F.2d 100 (C.A. 8), certiorari denied *sub nom. Iowa* v. *Dunlop*, 421 U.S. 1015, and *Brennan* v. *Dillion*, 483 F.2d 1334 (C.A. 10), both of which held that the "ultimate consumer" of the materials handled in the employer's operations was not the employer itself, but the students and patients of the schools and hospitals (in the *Iowa* case) and the tenants of the apartment house (in the *Dillion* case) for whose "use and benefit" the materials were handled (see 494 F. 2d at 104; 483 F.2d at 1337). See also *Glick* v.

[3] Section 3(i) provides:

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part of ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

State of Montana, 157 Mont. 204, 213, 485 P.2d 42, 47. While the Fifth Circuit has expressed disagreement with *Dillion* insofar as the decision concerned supplies and materials that were never directly handled by the beneficiaries of the services (in that case, gasoline and oil products used by a trash removal company), that court stated that "[a] different problem was presented in *Brennan* v. *State of Indiana*" (the instant case), where the employees of "state-run schools and hospitals * * * handled food and supplies used but not paid for by students and patients * * *." *Dunlop* v. *Industrial America Corporation*, 516 F.2d 498, 499, n. 4.

No purpose plausibly attributable to Congress has been suggested for exempting employers when the supplies from outside the state are used in the operation of the business itself. The reason for the "ultimate consumer" exception in the 1938 definition of "goods" in Section 3(i) was the need to protect retail purchasers from the provisions of Section 15(a)(1), 29 U.S.C. 215(a)(1), which make it unlawful to transport "goods" produced in violation of the Act. *Brennan* v. *Dillion*, *supra*, 483 F.2d at 1337. The proviso in Section 3(s), enacted in 1961, which introduced the "handling" of goods from out-of-state sources as a new basis of coverage, was adopted in express recognition of "[t]he obvious economic fact that demand for a product causes its interstate movement quite as surely as does production" (107 Cong. Rec. 6236 (1961)). See H.R. Rep. No. 75, 87th Cong., 1st Sess. 3, 8 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 3-4 (1961); 107 Cong. Rec. 5841,

6234, 6240-6241 (1961). With the legislative purpose thus focused on interstate inflow caused by the demand for supplies, no reason appears why Congress should have intended that an employer who causes such inflow by his purchases should nevertheless be exempt if he later uses the supplies in his own operations.

In any event, whatever basis there may previously have been for arguing the point, it was removed by Section 6(a)(5)(E) of the Fair Labor Standards Amendments of 1974, P.L. 93-259, 88 Stat. 55, 60, under which all employees of a public agency are now deemed to be "engaged in commerce" within the meaning of Section 3(s). Under the amended statute, it is immaterial whether state employees handle "goods * * * that have been moved in * * * [interstate] commerce." Moreover, even as to private employment, it is no longer necessary to refer to the definition of "goods" in Section 3(i), with its reference to "ultimate consumers," because Section 6(a)(5)(A) of the 1974 amendments added the words "or materials" after "goods" in Section 3(s). 88 Stat. 59. The change was made for the express purpose of eliminating any doubt as to the correctness of *Dillion* by making "clear the Congressional intent to include within this [handling] basis of coverage the handling of goods consumed in the employer's business, as, *e.g.*, the soap used by a laundry." S. Rep. No. 93-690, 93d Cong., 2d Sess. 17 (1974). Thus the issue presented here arises out of superseded language and will not recur.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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